SUPREME COURT, U. S.
Office Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 370

GEORGE E. FARRELL, as Administrator *de bonis non* of the Estate of WYAND F. DOERNER, JR., deceased,

DIANE SOKOLOWSKI, as Administratrix of the Estate of GEORGINA LOPEZ BURDEN, deceased,

JULES BRODY, as Administrator with will annexed of the Estate of WASHINGTON LAFAYETTE BLACKMON, JR., deceased,

DANIEL DONNELLY, as Administrator *de bonis non, cum testamento annexo* of the Estate of J. DUDLEY HUTCHINSON, deceased,

DANIEL DONNELLY, as Administrator *de bonis non, cum testamento annexo* of the Estate of J. DUDLEY HUTCHINSON, JR., deceased,

ANDREW P. O'ROURKE, as Administrator of the Estate of C. L. HUTCHERSON, JR., deceased,

GERALD A. ROBBIE, as Administrator *de bonis non* with will annexed of the Estate of JOSEPH EMILE BERMAN, deceased,

PAUL S. EDELMAN, as Administrator *de bonis non* with will annexed of the Estate of ELLEN S. LOVE, deceased,

PAUL S. EDELMAN, as Administrator of the Estate of LUCY ANN LOVE, deceased,

PAUL S. EDELMAN, as Administrator of the Estate of ELLEN CABOT LOVE, deceased,

PAUL S. EDELMAN, as Administrator of the Estate of WILLIAM D. LOVE, V, deceased,

AMERICAN BANK & TRUST COMPANY, as Administrator *cum testamento annexo* of the Estate of JAMES HENRY STUART, deceased, and

AMERICAN BANK & TRUST COMPANY, as Administrator *cum testamento annexo* of the Estate of THOMAS C. WHITE, deceased,

Petitioners,

v.

PIEDMONT AVIATION, INC., THE BOEING COMPANY and UNITED STATES OF AMERICA,

Defendants,

and

RAPIDAIR, INC., and LANSEAIR, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LEE S. KREINDLER,
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New York, New York 10016,
Counsel for Petitioners.

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Defendants,

and

RAPIDAIR, INC., and LANSEAIR, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the opinions of the United States Court of Appeals for the

Second Circuit, affirming judgments of the United States District Court for the Southern District of New York, entered in the above-entitled case on April 29, 1969.

Citations to Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, printed in Appendix B hereto, *infra*, has not as yet been reported. The opinion of the United States District Court for the Southern District of New York, printed in Appendix B hereto, *infra*, has been reported in 295 F. Supp. 228.

Questions Presented

1. Whether the constitutional guarantees of equal protection of and privileges to all citizens were breached by the courts below in denying New York petitioners-administrators the provisional remedy of attaching tortfeasors' property solely because the decedents and their beneficiaries were not residents of New York, identical attachments having been recognized as constitutionally available to New Yorkers.

2. Whether the courts below contravened their constitutional obligation in this diversity jurisdiction case to apply New York law which grants the remedy of attachment irrespective of the residence of plaintiffs-petitioners or their decedents and beneficiaries.

Jurisdiction

The judgment of the United States Court of Appeals was entered on April 29, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes Involved

The statutory provisions involved are: Federal Rules of Civil Procedure 64 and New York Civil Practice Law and Rules §§ 5201(a), 6201(1) and 6202. They are printed in Appendix A, *infra.*

Statement

The jurisdiction of the district court was invoked under 28 U.S.C. § 1332 as to the four corporate defendants due to the existence of diversity of citizenship: all plaintiffs were citizens of New York, and each of the said defendants was a corporation duly organized under the laws of and with its principal place of business in a state other than New York. As to defendant United States of America, the jurisdiction of the district court was invoked under the Federal Tort Claims Act, 28 U.S.C. § 1346 *et seq.*

The instant wrongful death action was commenced on June 21, 1968 in the United States District Court for the Southern District of New York. The action was brought on behalf of the estates of thirteen decedents who, while passengers for hire aboard a Boeing 727 jet aircraft operated by defendant Piedmont Aviation, Inc., and owned, manufactured and designed by defendant The Boeing Company, met their deaths when said jet collided in mid-air with a Cessna 310 aircraft over Hendersonville, North Carolina, on July 19, 1967. The Cessna was owned and operated by respondent Lanseair, Inc., the employer of the plane's co-pilot, and was also operated by respondent Rapidair, Inc., the employer of the pilot-in-command of the aircraft. Defendant United States of America's air traffic controllers were instructing both airplanes for the purpose of separating them during flight.

The wrongful deaths were caused by the intimately entwined negligence of the defendants. Thus, joinder in one

court of all parties-defendant was essential since omission of one would have provided the others with the opportunity to successfully defend by placing the entire blame upon the omitted defendant.

The New York Federal Court was the *only* forum in which the plaintiffs could join all defendants together (the circumstances underlying and substantiating this conclusion are detailed in a Petition for Writ of Mandamus and/or Prohibition, No. 2300 Misc., Oct. Term, 1969, filed by petitioners, to which the Court's attention is respectfully invited).

In personam jurisdiction was obtained over defendants Piedmont, Boeing and the United States. *Quasi in rem* jurisdiction was obtained over the respondents, defendants Lanseair and Rapidair, by attaching their respective aircraft liability insurance policies in New York. Said attachments served the additional and equal purposes of obtaining security for the payment of judgment. The combined total of the two policies is $550,000. Since eighty-two persons lost their lives in the mid-air collision, only a few of the death claims could be satisfied by the insurance coverage. Moreover, Lanseair and Rapidair possessed wholly inadequate corporate funds to satisfy more than a few additional claims.

Lanseair and Rapaidair moved to vacate the attachments, set aside service of process and dismiss the actions against them. The Honorable Inzer B. Wyatt, United States District Judge, Southern District of New York, granted said motions on November 27, 1968, and judgments were entered on December 2, 1968 as to Rapidair, and on December 10, 1968 as to Lanseair. Petitioners thereafter appealed to the United States Court of Appeals for the Second Circuit which affirmed the district court holding that the provisional remedy of attachment of a liability insurance obligation was not available to petitioners because their decedents and beneficiaries were not residents of New York.

Reasons for Granting Writ

Two bases justify the grant of this writ: first, by denying petitioners the provisional remedy of attachment solely by reason of the non-residence in New York of the decedents and their beneficiaries, the courts below breached the constitutional guarantees of equal protection of the laws and uniform recognition of the privileges accorded all citizens without discrimination as to their residence; and second, by denying petitioners the attachment remedy, the courts below contravened their constituitonal obligation in this diversity jurisdiction case to apply New York law which grants attachments to New Yorkers and non-residents alike.

Article IV, § 2 of the Constitution provides:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

The Fourteenth Amendment, § 1 declares:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Equal protection of and equal privileges to all citizens, irrespective of their place of residence, is the pertinent hallmark of these constitutional rights. Correspondingly, no state may deny the "privilege of protection to creditors who are citizens of other States that it accords to its own citizens." *Owenby* v. *Morgan*, 256 U. S. 94, 109-10 (1921); *see also, Blake* v. *McClung*, 172 U. S. 239 (1898).

New York's highest court has specifically recognized that non-resident plaintiffs are entitled to the same rights

of attachment as New Yorkers. *Hibernia Nat'l Bank* v. *Lacombe*, 84 N. Y. 367 (1881); *accord, People's Trust Co.* v. *Goodell*, 134 Misc. 692, 236 N.Y.S. 549 (Sup. Ct. 1929):

> "We have refused to adopt the distinction made in some of the states, and have placed the right of a creditor coming here . . . upon the same footing as that of a citizen or resident creditor, and have sustained the lien of an attachment issued here. . . ." *Barth* v. *Backus*, 140 N. Y. 230, 239 (1893).

New York statutes grant this provisional remedy to any person without regard to his residence. N. Y. Civil Practice Law and Rules §§ 6202, 6201(1) and 5201(a). Attachments of various kinds of property have been upheld in favor of non-New Yorkers. *Katz* v. *Liston*, 22 App. Div. 2d 205, 254 N.Y.S. 2d 389 (1st Dept. 1964); *Bridges* v. *Wade*, 110 App. Div. 106, 97 N.Y.S. 156 (1st Dept. 1905); *Atkins* v. *Fitzpatrick*, 57 Misc. 341, 109 N.Y.S. 619 (Sup. Ct. 1908). Recently, attachments of debts identical to those at bar obtained by New York residents have been approved by New York's highest court, *Seider* v. *Roth*, 17 N. Y. 2d 111, 269 N.Y.S. 2d 99 (1966); *Simpson* v. *Loehmann*, 21 N. Y. 2d 305, 287 N.Y.S. 2d 633 (1967), *reargument denied*, 21 N. Y. 2d 990, 290 N.Y.S. 2d 914 (1968), and it has not denied non-residents such an attachment.

In *Minichiello* v. *Rosenberg*, —— F. 2d —— (2d Cir. April 2, 1969), the Second Circuit *en banc* held that it was constitutionally proper for a New Yorker to attach liability insurance debts of the same type as those involved in the instant case.

The courts below specifically held that the non-residence of petitioners' decedents and their beneficiaries was the sole basis for vacating the subject attachments. It is respectfully submitted that such discrimination between citizens, predicated solely on their residence, violates the

language and spirit of the equal protection and privileges clauses of the Constitution.

The district court was vested with diversity jurisdiction of petitioners' claims against respondents Rapidair and Lanseair, the insureds in the attached insurance policies, pursuant to 28 U.S.C. § 1332. *Erie R.R.* v. *Tompkins*, 304 U. S. 64 (1937), imposed the constitutional obligation upon the courts below to apply New York law as it exists, not as they believe it should exist. This mandate prohibits application of "federal common law" on constitutional grounds. *Id.* at 77-78.

Beyond this, Rule 64, F.R.C.P., provides that the provisional remedy of attachment shall be available in federal courts "in the manner provided by the law of the state in which the district court is held." New York attachment law was thus applicable. *See also, Huron Holding Corp.* v. *Lincoln Mine Operating Co.*, 312 U. S. 183 (1941).

New York statutes provide that this provisional remedy is available under certain specified conditions, all of which have been met by petitioners herein: (a) this is an action which seeks a money judgment [N. Y. C.P.L.R. § 6201]; (b) respondents Rapidair and Lanseair, by virtue of their incorporation in Missouri, are foreign corporations [N. Y. C.P.L.R. § 6201(1), N. Y. Bus. Corp. L. § 102(a)(7)]; and (c) the property in question (i.e., the liability insurance obligations) is a "debt". [N. Y. C.P.L.R. §§ 5201(a), 6202]. As to this third requirement, New York's highest court has held on two occasions that the obligations to defend and indemnify contained in a liability insurance policy is a "debt" within the meaning of the C.P.L.R. In *Seider* v. *Roth, supra,* the issue was succinctly presented and resolved as follows:

> "This appeal, taken by leave of the Appellate Division, brings us to a question new to this court—in a personal injury action against a non-resident defend-

> ant, is defendant's liability insurer's contractual obligation to defend and indemnify defendant a 'debt' owing to defendant and as such subject to attachment under CPLR 6202? Both courts below answered that question in the affirmative. We think that this is the correct answer." 17 N. Y. 2d at 112, 269 N.Y.S. 2d at 100.

In *Simpson* v. *Loehmann, supra,* New York's highest court held that the attachment of such a "debt" was not violative of due process:

> "[W]e perceive no denial of due process since the presence of that debt in this State . . .—contingent or inchoate though it may be—represents sufficient of a property right in the defendant to furnish the nexus with, and the interest in, New York to empower its courts to exercise an in rem jurisdiction over him." 21 N. Y. 2d at 310, 287 N.Y.S. 2d at 636.

This due process requirement was satisfied in the case at bar by virtue of the fact that the two insurers and the syndicates managing them did considerable business in or had their principal offices in New York City. Thus the "debts" of each insurer to its respondent herein was located in New York.

The statutes dealing with attachment do not contain any requirement of residency on the part of the attaching plaintiffs. The reasons are obvious: first, attachment is nothing more than a remedy in aid of an ordinary action and there is no reason to deny it to a non-resident where he is entitled to bring the action itself; second, to do otherwise is violative of constitutional rights.

Indeed, for many years, New York cases emphasized this simple matter of logic by granting the remedy of attachment to non-residents, *Katz* v. *Liston, supra; Bridges* v. *Wade, supra; Atkins* v. *Fitzpatrick, supra,* and by treating

all citizens equally in this regard. *Barth* v. *Backus, supra; Hibernia Nat'l Bank* v. *Lacombe, supra; People's Trust Co.* v. *Goodell, supra.*

Even the district court below was constrained to admit that:

> Logically the *Seider* v. *Roth* attachments should not be affected by whether the action is for the benefit of a New York resident. The holding was that the insurance contract was a "debt" within the meaning of CPLR Sections 5201 and 6202 and was thus subject to attachment." (Appendix B, at 27.)

Nevertheless, the courts below, contrary to logic, the dictates of the statutes of New York and its highest court, and the Constitution, vacated the attachments for the sole reason that petitioners' decedents and their beneficiaries were non-New Yorkers.*

The rationale of the Court of Appeals below that "except for the doing of business by the insurers" there are "absolutely no New York contacts", begged the question and ignored the nature of *quasi in rem* jurisdiction. The situs of the *res* (i.e., the location of the insurers who were obliged to indemnify and defend respondents pursuant to the insurance policies) is the sole foundation of *quasi in rem* jurisdiction and, therefore, is the *only* contact of any jurisdictional or constitutional significance. Since the gar-

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* Even if it be assumed *arguendo* that attachments are available only to residents of New York, the fact is that petitioners are New York domiciliaries and the duly appointed administrators of their respective estates. As such they are the real parties in interest and exclusively vested with the authority to sue in New York for the deaths of the decedents. F.R.C.P. 17(a); C.P.L.R. § 1004. In short, if residency is material, it is that of the petitioners and not, as erroneously held by the courts below, that of their beneficiaries or decedents. *Mecom* v. *Fitzsimmons Drilling Co.*, 384 U. S. 183 (1931); *Mexican Central Ry.* v. *Eckman*, 187 U. S. 429 (1903); *Mechan* v. *Central R. R.*, 181 F. Supp. 594 (S.D.N.Y. 1960).

nishee insurance companies were licensed to do and did business in New York, due process requirements were satisfied and a New York forum is constitutionally available. *Pennoyer* v. *Neff*, 95 U. S. 714 (1877); *Harris* v. *Balk*, 198 U. S. 215 (1905). The residences of the creditors (plaintiffs, decedents or beneficiaries) is thus irrelevant.

Conclusion

For the foregoing reasons, this Petition for Writ of Certiorari should be granted and, in addition, the courts below should be summarily reversed and the cause remanded with instructions to deny the motions to vacate the orders of attachment.

Respectfully submitted,

LEE S. KREINDLER,
MILTON G. SINCOFF,
GERALD A. ROBBIE,
RICHARD M. ZAROFF,
Counsel for Petitioners.

Appendix A

Statutes Involved

FRCP 64:

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

N. Y. C.P.L.R. § 5201(a):

(a) Debt against which a money judgment may be enforced. A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or non-resident, unless it is exempt from application to the satisfaction of the judgment. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state.

N. Y. C.P.L.R. § 6201(1):

An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has de-

manded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when:

1. The defendant is a foreign corporation or not a resident or domiciliary of the state.

N. Y. C.P.L.R. § 6202:

Any debt or property against which a money judgment may be enforced as provided in section 5201 is subject to attachment. The proper garnishee of any such property or debt is the person designated in section 5201; for the purpose of applying the provisions to attachment, references to a "judgment debtor" in section 5201 and in subdivision (h) of section 105 shall be construed to mean "defendant."

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 444-456—September Term, 1968.

(Argued March 25, 1969 Decided April 29, 1969.)

Docket Nos. 33123, 33135-33146

GEORGE E. FARRELL, as Administrator *de bonis non* of the Estate of WYAND F. DORNER, JR., deceased,

DIANE SOKOLOWSKI, as Administratrix of the Estate of GEORGINA LOPEZ BURDEN, deceased,

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Appendix B

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AMERICAN BANK & TRUST COMPANY, as Administrator *cum testamento* of the Estate of THOMAS C. WHITE, deceased,

Plaintiffs-Appellants,

v.

PIEDMONT AVIATION, INC., THE BOEING COMPANY and UNITED STATES OF AMERICA,

Defendants,

and

RAPIDAIR, INC., and LANSEAIR, INC.,

Defendants-Appellees.

Before:

WATERMAN, MOORE and FRIENDLY,

Circuit Judges.

Appeals in a wrongful death action by New York citizens who were appointed as administrators of the estates of nonresident decedents, from orders of the District Court for the Southern District of New York, Inzer B. Wyatt, *Judge,* vacating attachments of the liability insurance policies of defendants Rapidair, Inc. and Lanseair, Inc., and judgments dismissing the complaint against them. Affirmed.

LEE S. KREINDLER (Kreindler & Kreindler, New York, N. Y., Milton G. Sincoff and Gerald A. Robbie, of Counsel), *for Plaintiffs-Appellants.*

Appendix B

JOHN J. MARTIN (Bigham, Englar, Jones & Houston, New York, N. Y., Robert F. Ewald, of Counsel), *for Lanseair, Inc.*

WALTER E. RUTHERFORD (Haight, Gardner, Poor & Havens, New York, N. Y.), *for Rapidair, Inc.*

EDWARD F. HAYES, III (Chadbourne, Parke, Whiteside & Wolff, New York, N. Y., P. G. Pennoyer, Jr. and Daniel J. O'Neill, of Counsel), *for Piedmont Aviation, Inc.*

BENJAMIN E. HALLER, New York, N. Y., *for The Boeing Company.*

PATRICIA M. HYNES, Ass't U. S. Attorney (Robert M. Morgenthau, U. S. Attorney for the Southern District of New York, Michael D. Hess, Ass't U. S. Attorney, of Counsel), *for United States of America.*

FRIENDLY, *Circuit Judge*:

These appeals are the latest fallout to reach this court from the much criticized decision in *Seider* v. *Roth*, 17 N. Y. 2d 111, 269 N.Y.S. 2d 99 (1966), which we have recently declined to declare unconstitutional on the facts presented in *Minichiello* v. *Rosenberg* and *Stevens* v. *Tyng*, —— F. 2d —— (1968), adhered to by the court *in banc*, in —— F. 2d —— (1969), slip opinions 575, 1751.

The action, brought in the District Court for the Southern District of New York, stemmed from the collision of a Boeing jet aircraft operated in commercial service by Piedmont Aviation, Inc., and a Cessna private aircraft owned by Lanseair, Inc. and operated by Rapidair, Inc. The crash occurred over North Carolina. All seventy-four passengers and five crew members of the Piedmont jet

and the pilot and both passengers of the Cessna were killed. Plaintiffs are New York citizens who have been appointed as administrators of the estates of 13 passengers of the Piedmont aircraft; eight of these were citizens of Mississippi, one of Texas, two of Tennessee, and two of Maryland.[1] The defendants are Lanseair, Rapidair, Piedmont, Boeing and the United States. Lanseair and Rapidair are Missouri corporations not subject to *in personam* jurisdiction in New York. Piedmont and Boeing, also foreign corporations, apparently were. Since they do not have their principal places of business in New York or in the states of residence of any of the decedents, there was diversity as between the plaintiffs and the corporate defendants even if it be proper to be behind the citizenship of the administrators, as recently held in *McSparran* v. *Weist*, 402 F. 2d 867 (3 Cir. 1968), petition for cert. filed, 37 U. S. L. W. 3201 (U. S. Nov. 25, 1968) (No. 772). Jurisdiction over the claim against the United States was conferred by 28 U.S.C. § 1346(b).

Plaintiffs' problem was how to acquire jurisdiction in New York with respect to Lanseair and Rapidair. They sought to meet it by availing themselves of *Seider* v. *Roth*, and attaching the liability insurance policies issued to Lanseair and Rapidair respectively by Federal Insurance Company and St. Paul Fire and Marine Insurance Company, both doing business in New York.[2] Lanseair, Rapidair and the two insurers responded with motions to vacate the attachments and to dismiss the action against

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[1] Some of the decedents died intestate; others left wills. All the beneficiaries of the potential wrongful death recovery are also non-New Yorkers.

[2] The policy limits were $250,000 for Federal and $300,000 for St. Paul, substantially less than the claims of the 13 plaintiffs in this action, not to speak of the many other persons killed whose representatives have sued in North Carolina and, we understand, elsewhere.

the two defendants. In addition to challenging the basic constitutionality of *Seider* v. *Roth*, they asserted that the procedure was inapplicable to an action in which the true beneficiaries were non-residents. Motions were also made by Piedmont and the United States under 28 U.S.C. § 1404(a) to transfer the action to the Western District of North Carolina, where many other suits arising out of the accident are pending. On November 27, 1968, Judge Wyatt granted both sets of motions; on December 2 and 10, 1968, the clerk entered judgments dismissing the complaint as against Rapidair and Lanseair, respectively. Another panel of this court has declined to interfere with the order of transfer, *Farrell* v. *Wyatt*, —— F. 2d —— (2 Cir. 1969), slip opinions 1515. The instant appeals are from the vacating orders and the judgments of dismissal.

At the outset we note and reject a challenge to our appellate jurisdiction. Lanseair and Rapidair contend that Judge Wyatt's orders left undisturbed a service of *in personam* process attempted over them after the attachments had been obtained; that final dismissal of the action against them was effected only by an order of the District Court for the Western District of North Carolina after the transfer; that the orders here under attack are thus interlocutory; and that review of them can be had only by an appeal in the Fourth Circuit from the order of dismissal.

The argument flies in the face of the language of Judge Wyatt's orders. These not only vacated the attachments but, the judge having made the determination required by F. R. Civ. P. 54(b), directed the clerk to enter judgment dismissing the actions against the two defendants "for lack of jurisdiction over the person." The judgments subsequently entered conformed to this direction. The record does not disclose why Lanseair and Rapidair thought it necessary to obtain further orders in the Western District of North Carolina vacating the attempted *in per-*

sonam service, and plaintiffs have scant reason to appeal from these since they can now effect such service on Rapidair and Lanseair under the North Carolina long-arm statute, N. C. Gen. Stat. § 1-107.3. The issue of practical importance is whether in the North Carolina litigation plaintiffs are entitled to a preferred position with respect to Rapidair's and Lanseair's insurance coverage by virtue of the New York attachments. That issue was decided in the Southern District of New York prior to the transfer and this court would be the most appropriate place for review even if Judge Wyatt had merely vacated the attachments and not entered orders of dismissal. Cf. *Swift & Co.* v. *Compania Colombiana del Caribe, S.A.*, 339 U. S. 684, 688-89 (1950). However, in light of the tenor of his orders appellants not only might but had to appeal from them here. We therefore proceeded to the merits.

Appellants' argument is straightforward—indeed, Judge Wyatt conceded it was "logical." Nothing in the New York attachment statute, CPLR § 6201(1), limits that remedy to residents. They say therefore that if Lanseair or Rapidair had owned tangible property in New York or had accounts in New York banks, the attachments would have been valid if made in a state court and consequently were so in a federal action, F. R. Civ. P. 4(e).[3] *Seider* v. *Roth*, and its

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[3] Appellants recognize that a New York court could nevertheless dismiss the action on the ground of *forum non conveniens*. See *Bata* v. *Bata*, 304 N. Y. 51, 105 N. E. 2d 625 (1952); *Vaage* v. *Lewis*, 29 A. D. 2d 315, 288 N.Y.S. 2d 521 (2d Dept. 1968). Assuming that a similar dismissal would be available to a federal court despite the remedy afforded by 28 U.S.C. § 1404(a), appellants say this would be improper in the instant case. A North Carolina statute, N. C. Gen. Stat. § 28-8(2), 28-173, requires any action for the death of an intestate decedent to be brought by a North Carolina resident appointed as administrator and this would defeat diversity since Piedmont is a North Carolina corporation. On the other hand the United States could not be sued in a North

(*footnote continued on following page*)

successor, *Simpson* v. *Loehmann*, 21 N. Y. 2d 305, 287 N.Y.S. 2d 633 (1967), hold that the insurer's obligations to defend and to indemnify make the policy a "debt" attachable under § 6202. Q.E.D.[4]

(*footnote continued from previous page*)

Carolina state court. Hence a New York federal court is the only one in which jurisdiction over all these defendants can be had in an action on behalf of decedents who died intestate. For reasons later indicated, we find it unnecessary to consider this. However, the facts do demonstrate the desirability of legislation that would permit—or, indeed, require—all claims arising out of a major airplane accident to be litigated in a single federal court. See S. 961, 91st Cong. 1st Sess., introduced by Senator Tydings, Feb. 7, 1969.

[4] The parties have not discussed New York's statutory restriction on the maintenance of actions against foreign corporations. Business Corporation Law § 1314 provides that a New York resident or a domestic corporation may sue a foreign corporation in the state courts upon any claim, but a nonresident or a foreign corporation may sue another foreign corporation only when either the claim sued upon or the defendant corporation has specified connections with the state. See also General Corporation Law §§ 224-25. This limitation, "reflecting this State's policy against lending its courts to the resolution of disputes between nonresident parties," *Simonson* v. *International Bank*, 14 N. Y. 2d 281 (1962), limits the subject-matter jurisdiction of the courts and cannot be waived by the defendant. *Davis* v. *Kessler & Co.*, 194 N.Y.S. 9 (Sup. Ct. 1922); *Fidan* v. *Austral American Trading Corp.*, 168 N.Y.S. 2d 27 (Sup. Ct. 1957); *Electronic Race Patrol, Inc.* v. *National Trailer Convoy, Inc.*, 191 F. Supp. 364 (S.D.N.Y. 1961). The state courts have applied the restriction without regard to whether jurisdiction over the defendant was obtained *in personam* or by attachment *quasi in rem*. See *Banque de France* v. *Supreme Court*, 287 N. Y. 483, cert. denied, 316 U. S. 646 (1942); *Gano-Moore Coal Mining Co.* v. *W. E. Deegans Coal Co.*, 214 App. Div. 634 (1st Dept. 1925); *Cala* v. *Luis De Ridder, Ltda.*, 17 A. D. 2d 729 (1st Dept. 1962). The provision has been upheld against constitutional attack as a reasonable limitation on access to the courts, *Douglas* v. *New York, N. H. & H. R.R.*, 279 U. S. 377 (1929), and see *Missouri ex rel. Southern Ry.* v. *Mayfield*, 340 U. S. 1 (1950), and a federal court sitting in a diversity case is bound to give it effect,

(*footnote continued on following page*)

Appendix B

Whatever the conceptual beauty of the argument, it neglects the facts. If we pass the New York citizenship of the administrators for the moment, the action is by nonresidents against other nonresidents who have no contacts with New York, and arises out of an occurrence in another state. In truth the defendants own nothing in New York or at least nothing that they do not "own" to the same

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see *Guaranty Trust Co.* v. *York*, 326 U. S. 99 (1945); *First Nat'l Bank* v. *United Air Lines*, 190 F. 2d 493 (7 Cir. 1951), rev'd on other grounds, 342 U. S. 396 (1952)—although commentators have questioned both these propositions. See B. Currie & Schreter, Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities, 69 Yale L.J. 1323, 1346-49, 1379-91 (1960); Hart & Wechsler, The Federal Courts and the Federal System 668-72 (1953).

If the nonresident accident victims represented by these plaintiffs were alive and were suing on their own behalf, we might thus be forced to conclude that Business Corporation Law § 1314 closed the federal courts' doors to them against appellees. It is a question of state law whether the action stands differently under that section simply because the victims have died and New York residents have been appointed to administer their estates. The state courts have long held, under § 1314 and its predecessors, that a resident to whom a claim has been assigned for the sole purpose of enabling him to bring suit may maintain an action in the state court although the assignor could not. See *McCauley* v. *Georgia R. Bank*, 239 N. Y. 514 (1924); *Banque de France* v. *Supreme Court, supra; Cincis* v. *Seaboard Air Line Ry.*, 113 N.Y.S. 2d 29 (Sup. Ct. 1952). Apparently this holds true as long as the assignment on its face transfers title, without regard to the consideration paid or the use to be made of the proceeds of the claim. *Segal Lock & Hardware Co.* v. *Markey*, 124 N.Y.S. 2d 181 (Sup. Ct. 1953). We might expect the state courts to be equally willing to countenance avoidance of § 1314 by appointment of a resident administrator, although we have not found a decision that establishes this. Cf. *Robinson* v. *Oceanic Steam Nav. Co.*, 112 N. Y. 315 (1889); *Silberfeld* v. *Swiss Bank Corp.*, 50 N.Y.S. 2d 838 (Sup. Ct.), aff'd 52 N.Y.S. 2d 585 (1st Dept. 1944). In the absence of a contrary indication we proceed on the assumption that the state courts would not hold this suit barred by § 1314.

extent in every state; their insurers are bound to defend and indemnify them wherever they are sued, even in a state where the insurers are not doing business. Under such circumstances, where there are absolutely no New York contacts except for the doing of business by the insurers, we have the gravest difficulty in understanding how New York could constitutionally call upon the insureds to respond or could impair by attachment rights the insurers would otherwise have to settle with other claimants.

Not reaching the constitutional issue, the district court pointed to statements in the two leading New York cases which it regarded as indicating that the Court of Appeals would limit *Seider* to suits by residents. Chief Judge Desmond wrote in *Seider* that there was "no policy reason against requiring the insurer to come in to New York and defend as to an accident which occurred in Vermont injuring New York residents," 17 N. Y. 2d at 114, 269 N.Y.S. 2d at 102. In *Simpson* Chief Judge Fuld said "the State has a substantial and continuing relation with the controversy" in a case "where the plaintiff is a resident of the forum state and the insurer is present and regulated by it," 21 N. Y. 2d at 311, 287 N.Y.S. 2d at 637, and Judge Keating's concurrence rested on the assumed constitutionality of permitting a direct action against the insurer by a New York resident even for an out-of-State accident, 21 N. Y. 2d at 312-14, 287 N.Y.S. 2d at 638-40. See also *Vaage* v. *Lewis*, 29 A. D. 2d 315, 288 N.Y.S. 2d 521 (2d Dept. 1968). Appellants respond that these observations were simply descriptive of the cases *sub judice* and that, when faced with the problem here presented, the Court of Appeals would feel bound to apply the attachment statutes as their letter requires. We doubt this. A court that could perform the "miracle" on CPLR 320(c) that was effected in the opinion denying reargument in *Simpson* v. *Loehmann*, 21 N. Y. 2d 990, 290 N.Y.S. 2d 914 (1968), see *Minichiello* v. *Rosenberg*,

supra, —— F. 2d at —— & n. 7, slip opinions 584-87, would scarcely shrink from the easier task of saying that a liability insurance policy was a "debt" only when the plaintiff was a resident or was suing for a New York accident. This would be particularly true if the Court of Appeals considered that such a restrictive construction was needed to save *Seider* from unconstitutionality or even from serious constitutional doubt. See, e.g., *Richmond Screw Anchor Co.* v. *United States,* 275 U. S. 331, 346 (1928); *Lucas* v. *Alexander,* 279 U. S. 573, 577 (1929); *Crowell* v. *Benson,* 285 U. S. 22, 62 (1932); *United States* v. *Rumely,* 345 U. S. 41, 45 (1953); *People* v. *Bell,* 306 N. Y. 110, 114 (1954); *Courtesy Sandwich Shop, Inc.* v. *Port of New York Authority,* 12 N. Y. 2d 379, 389, 240 N.Y.S. 2d 1, appeal dismissed, 375 U. S. 78 (1963). For reasons sufficiently indicated in *Minichiello* v. *Rosenberg. supra,* —— F. 2d at ——, ——, slip opinions at 581-83, and 1757-58 (concurring opinion of Judge Hays), and in this opinion, we are convinced that the constitutional doubt with respect to applying *Seider* v. *Roth,* in favor of nonresidents would be exceedingly serious.[5] While that may be an understatement, it would be enough to dispose of this case if the plaintiffs were nonresidents who had suffered injuries or nonresident representatives of nonresidents who had been killed.

The only remaining argument, that the plaintiffs here are New York citizens, requires little discussion. There

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[5] Appellants urge that limitation of *Seider* v. *Roth* to New York residents may itself create a constitutional problem. For reasons indicated in *Minichiello* v. *Rosenberg, supra,* —— F. 2d at —— n. 6, slip opinions at 583 n. 6, we see no basis for this where, as in that case, the only persons injured were residents or where, as here, nonresidents have invoked *Seider* but no resident has. We have reserved the question of constitutionality where a resident seeks to utilize *Seider* to obtain what amounts to a preference over a nonresident. See *Minichiello* v. *Rosenberg,* —— F. 2d at —— (*in banc*), slip opinions at 1756.

would be no basis in reason for different treatment of an action by a nonresident who suffered serious injuries or by a nonresident executor of a nonresident who was killed, on the one hand, and one by a New York citizen who had been appointed administrator of a nonresident decedent, on the other. The constitutional doubt arises from New York's lack of meaningful contact with the claim; a court of another state cannot supply this by picking a New Yorker as administrator of the estate of a nonresident who suffered fatal injury.

Affirmed.

Appearances

Kreindler & Kreindler, Esqs., Attorneys for Plaintiffs, 99 Park Avenue, New York, New York 10016, Lee S. Kreindler, Esq., Milton G. Sincoff, Esq., Gerald A. Robbie, Esq., William D. Siegel, Esq., Of Counsel.

Haight, Gardner, Poor & Havens, Esq., Attorneys for Defendant Rapidair, Inc., and Garnishee St. Paul Fire and Marine Insurance Company, 80 Broad Street, New York, New York 10004, John Asnato, Jr., Esq., Walter E. Rutherford, Esq., Of Counsel.

WYATT, District Judge.

This is a motion by defendant Rapidair, Inc. (Rapidair) and by a "garnishee" St. Paul Fire and Marine Insurance Company (St. Paul) for an order vacating the attachment of the insurance policy issued by St. Paul to Rapidair, setting aside the service of process and dismissing the action as against Rapidair.

The claims asserted in the complaint are by the personal representatives of 13 passengers on a Piedmont Airlines plane who died when the plane crashed after a midair collision on July 19, 1967. There were 74 pas-

sengers and 5 crew members in the Piedmont plane and the pilot and 2 passengers in the plane with which it collided; all died on both planes.

The collision was over Hendersonville, North Carolina, and the crash was near that town. Hendersonville is in Henderson County, one of the counties in the Western District of North Carolina, and is some 20 or 25 miles south of Asheville, one of the places where Court is held in the District.

The complaint avers that defendant Piedmont Aviation, Inc. (Piedmont) was operating as a common carrier the Boeing aircraft which crashed and in which the decedents of plaintiffs were passengers; that the defendant The Boeing Company (Boeing) designed, made and owned the aircraft; that defendant Lanseair, Inc. (Lanseair) owned and operated a Cessna aircraft; that defendant Rapidair, Inc. (Rapidair) also operated, maintained, etc. this Cessna aircraft; that the Boeing plane and the Cessna plane collided, causing the crash; that the collision was caused by the concurrent negligence of all the defendants; that Piedmont, Lanseair, and Rapidair failed to keep an adequate lookout; that Boeing designed the cockpit of its aircraft unreasonably to restrict the field of vision; and that the United States operated an air traffic control facility at Asheville Municipal Airport from which it communicated to the two planes but caused them to collide by failing to issue proper instructions, information and clearances.

Jurisdiction over the claims against the United States is based on a part of the Federal Tort Claims Act (28 U.S.C. § 1246[b]). Jurisdiction over the claims against the other defendants is said to rest on diversity of citizenship (23 U.S.C. § 1332).

Each of the plaintiffs is an administrator, with or without a will annexed, of one or more of the 13 passengers.

Eight of these passengers were citizens of Mississippi, one of Texas, two of Tennessee, and two of Maryland. Six of the decedents appear to have died intestate; eight appear to have left wills. Each of the plaintiff administrators is a citizen of New York.

It seems to be undisputed that Piedmont, Boeing, Rapidair and Lanseair each is incorporated under the laws of, and has its principal place of business in, a state other than New York, Mississippi, Texas, Tennessee or Maryland. Diversity jurisdiction over these defendants is established.

Plaintiffs moved this Court *ex parte* for an order of attachment of the property of defendants Rapidair and Lanseair, Inc. under the authority of Fed. R. Civ. P. 4(e) and 64, giving plaintiffs the benefit of State attachment laws. Rapidair and Lanseair are said (without contradiction) to be Missouri corporations with their principal places of business in Missouri. New York CPLR § 6201(1) authorized an order of attachment against a foreign corporation defendant. It was represented that United States Aviation Underwriters, Incorporated and United States Aircraft Insurance Group, both doing business in New York, had issued an aircraft liability insurance policy to Rapidair with respect to the Cessna plane involved in the collision.

Judge Frankel made an order of attachment which order was filed June 21, 1968. The Marshal served notice of levy on United States Aircraft Insurance Group specifying that the levy was on an "obligation to defend and indemnify Rapaidair, Inc. and/or Lanseair, Inc. under an Aircraft Liability Insurance Policy".

It turned out that a mistake had been made and that the insurer of Rapidair was St. Paul, which does business in New York. A supplemental order of attachment was made by Judge Bonsal and filed July 9, 1968. This order directed the attachment, as the property of Rap-

idair, of the policy issued by St. Paul. This policy had been issued by an agent of St. Paul in Illinois and had been delivered to Rapidair in Missouri. The Marshal served notice of levy on St. Paul in New York on July 11, 1968, specifying that the levy was on "the obligation to defend and/or indemnify Rapidair, Inc. contained in an aircraft liability Insurance Policy".

The validity of the attachment is determined by the law of New York, subject to federal constitutional limitations.

A sharply divided (4-3) Court of Appeals of New York has sustained an attachment which, with one significant difference, was like that at bar. *Seider* v. *Roth,* 17 N. Y. 2d 111, 209 N.Y.S. 2d 99 (1966).

The significant difference is that plaintiffs in *Seider* v. *Roth* were residents of New York and the action was being prosecuted for their benefit. The Court declared that there was "no policy reason against requiring the insurer to come in to New York and defend as to an accident which occurred in Vermont *injuring New York residents* . . ." (17 N. Y. 2d at 114; emphasis supplied).

The question later came again before the Court of Appeals in *Simpson* v. *Loehmann,* 21 N. Y. 2d 305, 267 N.Y.S. 2d 633 (1967). Again plaintiffs were residents of New York and the action was prosecuted for their benefit. Again the Court (4-2) upheld the attachment. Two of the judges in the majority, however, voted to uphold the attachment "only on constraint of *Seider* v. *Roth*" (21 N. Y. 2d at 314) and while disagreeing with that decision, one of the two had in fact dissented in *Seider* v. *Roth;* those two judges voted to sustain the attachment "because the institutional stability of a court is more important than any single tolerable error" (21 N. Y. 2d at 316).

The opinion of Chief Judge Fuld, voting to sustain the attachment, emphasized the New York residence of plain-

tiffs: "Moreover, *where the plaintiff is a resident of the forum state* and the insurer is present in and regulated by it, the State has a substantial and continuing relation with the controversy. For jurisdictional purposes, in assessing fairness under the due process clause and in determining the public policy of New York, such factors loom large" (21 N. Y. 2d at 311; emphasis supplied). Judge Burke in dissent was not certain that *Seider* v. *Roth* required that the plaintiff be a resident of New York at the time of the accident and suggested a possible "privileges or immunities" problem if it did (21 N. Y. 2d at 318 and fn. 3).

Logically the *Seider* v. *Roth* attachment should not be affected by whether the action is for the benefit of a New York resident. The holding was that the insurance contract was a "debt" within the meaning of CPLR Sections 6201 and 6202, and was thus subject to attachment.

It is concluded, however, that—whether logical or not—the Court of Appeals of New York would not uphold a *Seider* v. *Roth* type of attachment where the action is for the benefit of a nonresident of New York. This same conclusion has been reached in a unanimous decision of the Appellate Division, Second Department. *Vaage* v. *Lewis,* 29 A. D. 2d 315, N.Y.S. 2d (March 4, 1968).

Plaintiffs press upon me that they are indeed residents and citizens of New York. At the same time they are only nominal parties; admittedly the action is entirely for the benefit of persons residing outside the State of New York, who were so residing at the time of the fatal crash, and whose decedents were residing outside the State of New York.

So far as defendants Rapidair, Inc. and Lanseair, Inc. are concerned the action in this Court must fail. The reasons for bringing the action here are perfectly understandable and from the standpoint of plaintiffs it is

desirable to have all the alleged tortfeasors before the same Court. By separate order the action is being transferred to the United States District Court for the Western District of North Carolina. It appears likely that by virtue of a type of "long arm" statute in North Carolina (N. C. Con. Stat. § 1-107.3) plaintiffs will be able to make service on Rapidair, Inc. and Lanscair, Inc. and subject them to the in personam jurisdiction of the federal court in North Carolina, thus to a substantial extent accomplishing their purpose.

The motion of defendant Rapidair, Inc. and of St. Paul Fire and Marine Insurance Company is granted. The orders of attachment filed June 21, 1968 and July 9, 1968 and all levies made thereunder are vacated and set aside. The service of process on defendant Rapidair, Inc. is vacated and set aside. There is an express determination that there is no just reason for delay (Fed. R. Civ. P. 54[b]) and the Clerk is expressly directed to enter judgment in favor of defendant Rapidair, Inc. dismissing the action as against said defendant for lack of jurisdiction over the person.

So Ordered.

Dated: New York, New York
November 27, 1968

INZER B. WYATT,
United States District Judge.

Appendix B

[SAME TITLE]

This is a motion by defendant Lanseair, Inc. and by a "garnishee" Federal Insurance Company for an order vacating the attachment of the insurance policy issued by the garnishee to Lanseair, Inc., setting aside the service of process, and dismissing the action as against Lanseair, Inc.

A similar motion by defendant Rapidair, Inc. is being granted by order, with opinion, filed today. There must be the same disposition of this motion.

The motion of defendant Lanseair, Inc. and of Federal Insurance Company is granted. The orders of attachment filed June 21, and July 9, 1968 and all levies made thereunder are vacated and set aside. The service of process on defendant Lanseair, Inc., is vacated and set aside. There is an express determination that there is no just reason for delay (Fed. R. Civ. P. 54[b]) and the Clerk is expressly directed to enter judgment in favor of defendant Lanseair, Inc. dismissing the action as against said defendant for lack of jurisdiction over the person.

So Ordered.

Dated: November 27, 1968.

Inzer B. Wyatt,
United States District Judge.